77-710

Supreme Court, U. S.
FILED
NOV 2 1977
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77

HUBERT CALL,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77

HUBERT CALL, Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA
Respondent

The Petitioner, Hubert Call, respectfully prays that a Writ of Certiorari issue to the Court of Appeal, First Appellate District, of the State of California to review the decision affirming the judgment of conviction in the Superior Court for Alameda County.

Judgment was entered, following a jury verdict of guilty, on March 5, 1976. The Court of Appeal, First Appellate District, affirmed the judgment by its unpublished opinion filed May 19, 1977. A timely Petition for Hearing to the Supreme Court, State of California was filed on June 28, 1977; the Petition was denied summarily on August 5, 1977.

OPINION BELOW

The opinion of the Court of Appeal, First Appellate District, of the State of California appears as Appendix Exhibit A hereto. The

order of the Supreme Court of the State of California denying a hearing appears as Appendix Exhibit B hereto.

JURISDICTION

The Judgment of the Court of Appeal, First Appellate District, was entered on May 19, 1977 affirming Petitioner's conviction dated March 5, 1976. Thereafter the Supreme Court of California denied a Petition for Hearing on August 5, 1977. This petition has been filed within 90 days thereof. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

I. Is a defendant denied due process of law when his preliminary examination is interrupted and abruptly terminated by the District Attorney, who thereafter obtains an indictment on the same charges from a grand jury?

II. Is the defendant denied equal protection of a law requiring that a preliminary examination be completed at one session when the District Attorney obtains a continuance upon an intentional misrepresentation to the Court that he needs time to file "Points and Authorities", when in fact the continuance is obtained so that the case can be taken to the grand jury for an indictment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved

are the Due Process and Equal Protection clauses of the Fourteenth Amendment.

HISTORY OF THE CASE

On December 6, 1974, Petitioner was arrested at his jewelry store in Albany, California for attempting to receive stolen property. Thereafter, the District Attorney's office sought to obtain an information through a preliminary hearing in the Municipal Court, Berkeley-Albany Judicial District. After the prosecution had presented most of its case, the assistant District Attorney noted on the record that "the Court has expressed trepidation whether the facts set up in this case even support the charge at all." The assistant District Attorney represented to the Court and defense counsel that he needed time to research a point of law so that "authorities" on the issue could be presented to the Court, and on that basis he obtained a continuance of the preliminary hearing.

Immediately thereafter the District Attorney took the case to the grand jury. The preliminary hearing was never completed. Petitioner was indicted on April 3, 1975 by the grand jury for Alameda County and was charged with two counts of attempting to receive stolen property.

HISTORY OF THE PROCEEDINGS

A motion in the Superior Court of Alameda County to dismiss the indictment upon the ground that the preliminary hearing should have been completed was denied.

Petitioner was brought to trial and was convicted by a jury on the two counts charged, on March 5, 1976.

The Court of Appeal in its unpublished opinion held that it lay within the authority of the prosecutor to abandon the proceedings in municipal court, and proceed instead by indictment.

REASONS FOR GRANTING THE WRIT

I. THE INTERRUPTION AND ABRUPT TERMINATION OF PETITIONER'S PRELIMINARY EXAMINATION DENIED HIM DUE PROCESS OF LAW.

The California Constitution provides two separate methods of initiating a felony prosecution: Information or indictment (Cal. Const., art.I.§14). These alternative routes appear in the disjunctive in the Constitutional language and in the procedural statute, Penal Code §737. Article I. §14 states in pertinent part:

> "Felonies shall be prosecuted as provided by law, either by indictment or, ... by information..."

Cal. Penal Code §737 states in pertinent part:

> "All public offenses triable in the Superior Court must be prosecuted therein by indictment or information..."

It may be inferred from such language that the District Attorney may elect between the

two procedures. However, once a preliminary examination has begun the defendant has a protectable interest therein represented by his expenditure of attorneys fees and by the potential uses to which a preliminary examination lends itself in the hands of skilled counsel. It is recognized by the defense bar that a preliminary examination is an opportunity for pre-trial discovery.[1] Among the special rights recognized by California decision are wide-ranging cross-examination of the complaining witnesses, People v. Murphy (1963) 59 Cal.2d 818, 830-831, 382 P.2d 346, 354 and the presentation of an affirmative defense, Jennings v. Superior Court (1967) 66 Cal. 2d 867, 428 P.2d 304. When the preliminary examination was abruptly terminated Petitioner was summarily denied the opportunity to fully exercise such rights.

The Due Process clause of the Fourteenth Amendment requires that notice and a hearing be provided before an individual is deprived of the possession or use of property. The many types of property for which this Court has granted protection include wages, Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S.Ct. 1820; welfare aid, Goldberg v. Kelly (1970) 397 U.S. 254, 90 S.Ct. 1011; driving privileges, Bell v. Burson (1971) 402 U.S. 535, 91 S.Ct. 1586; household goods, Fuentes v. Shevin (1972) 407 U.S. 67, 92 S.Ct. 1983; and bank accounts, North Georgia Finishing, Inc. v. Di-Chem, Inc. (1975)

[1] Bailey and Rothblatt, "Investigation of Criminal Cases-Federal and State §349 (1970); "Homicide", 7 Am.Jur. Trials, 517 (1964)

419 U.S. 601, 95 S.Ct. 719, wherein it was stated,

> "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 419 U.S. at 608.

Defendants in criminal proceedings also have liberty interests which come within the contemplation of the Fourteenth Amendment. Recently, the right to notice and an hearing has been extended to proceedings for revocation of parole, Morrissey v. Brewer (1972) 408 U.S. 471, 92 S.Ct. 2593, and for imposition of prison discipline, Wolff v. McDonnell (1974) 418 U.S. 539, 94 S.Ct. 2963.

Whether Petitioner's protectable interest in the preliminary examination is characterized as a "property" right or as a "liberty"right is not critical. This Court is respectfully requested to grant releif on either basis.

II. THE TACTIC BY WHICH THE DISTRICT ATTORNEY OBTAINED A CONTINUANCE OF THE PRELIMINARY EXAMINATION UPON AN INTENTIONAL MISREPRESENTATION TO THE COURT THAT HE NEEDED TIME TO FILE "POINTS AND AUTHORITIES" AND IMMEDIATELY THEREAFTER SOUGHT AND OBTAINED AN INDICTMENT FROM THE GRAND JURY DEPRIVED PETITIONER OF EQUAL PROTECTION OF THE LAWS.

A preliminary examination must be com-

pleted at one session unless the magistrate, for good cause, postpones it. Cal. Penal Code §861. This requirement protects the defendant's right to personal liberty so that "no one is detained in custody indefinitely or capriciously in order that a case may be developed in the future, or circumstances arise that will justify a trial." People v. Bucher (1960) 175 Cal. App.2d 343, 346, 346 P.2d 202, 204.

As stated in Jaffe v. Stone (1941) 18 Cal.2d 146, 150, 114 P.2d 335, 388,

> "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.

A proceeding of such significance cannot be left dangling because of the whim of the prosecutor. The equal protection clause forbids intentional, arbitrary and discriminatory enforcement of nondiscriminatory laws. Yik Wo v. Hopkins (1886) 118 U.S. 356, 6 S.Ct. 1064; Murguia v. Municipal Court (1975) 15 Cal.3d 286, 540 P.2d 44.

CONCLUSION

For all the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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EXHIBIT A
IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, 1/Crim. 15735

Plaintiff and Respondent, (Superior Ct. No. 59346)

vs.

HUBERT CALL,

Defendant and Appellant,

THE COURT:*

Hubert Call appeals from a judgment imposing fines and concurrent terms of imprisonment after a jury found him guilty to two counts of attempting to receive stolen property (Pen.Code, §496).

Officers of the Alameda County Sheriff's Department suspected that appellant, the proprietor of a jewelry shop in Albany, was making a practice of purchasing stolen jewelry. An undercover officer, Guzman, wearing hippie regalia, went to appellant's shop, bringing with him wrapped in a handkerchief five pieces of jewelry which

*Before Caldecott, P.J. Christian, J. and Emerson, J. (assigned).

had been provided from official sources. The jewelry had been marked chemically, and the undercover officer was carrying a concealed radio transmitter.

Guzman offered to sell the jewelry to appellant, explaining that "it was ripped off from L.A." After some conversation, appellant paid Guzman $100 and took one of the pieces of jewelry; he refused to purchase the others, stating that they were "too easy to identify." Guzman left after stating that he would return in about a week with more "stuff from L.A."; appellant answered "okay." A few days later Guzman returned and displayed more jewelry to appellant, stating "This stuff is all ripped off from L.A." Again, appellant rejected some pieces of jewelry as being "too easy to identify" but purchased several items, including a diamond, for $450.

The investigating officers then obtained a search warrant and searched appellant's shop. Jewelry which had been purchased from Guzman was recovered. There was evidence that the prices paid by appellant to Guzman were substantially less than the wholesale value of the jewelry.

Appellant testified at trial, admitting that he purchased the jewelry from Guzman. He stated that he entered into

these transactions with Guzman on the understanding that Guzman was in contact with persons who had stolen jewelry from appellant some months earlier; he stated that he had been told by telephone that representatives of the thieves would soon be contacting him.

Appellant contends, citing Young v. Superior Court (1967) 253 Cal.App.2d 848, that where the jewelry purchased by appellant was not in fact stolen property he could not be found guilty of an attempt to receive stolen property. The Young decision does support appellant's contention; however, that decision is inconsistent with the reasoning of the California Supreme Court in People v. Rojas (1961) 55 Cal.2d 252; the Young holding has been rejected in several decisions which state the rule that "It is not necessary for the People to allege or prove that the defendant had any prior connection with the thief, or that the goods received had been stolen." (People v. Moss (1976) 55 Cal.App.3d 179; Lupo v. Superior Court (1973) 34 Cal.App.3d 657; People v. Parker (1963) 217 Cal.App.2d 422; People v. Meyers (1963) 213 Cal.App.2d 518.) The evidence amply supports the verdicts finding appellant guilty on both counts.

At the request of the defense, the

court instructed the jury on entrapment as a defense, employing the language of CALJIC No. 4.60. 1/ The court went on to instruct, in language of CALJIC No. 4.61, 2/that it is not entrapment for an officer to furnish a criminal opportunity

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1. CALJIC NO. 4.60:
A person is not guilty of crime when he commits an act or engages in conduct, otherwise criminal, when the idea to commit the crime did not originate in the mind of the defendant but originated in the mind of another and was suggested to the defendant by a law enforcement officer, or a person acting under the direction, suggestion or control of a law enforcement officer for the prupose of inducing defendant to commit the crime in order to entrap him and cause his arrest.

2. CALJIC No. 4.61:
When law enforcement officers are informed that a person intends to commit a crime, the law permits the officers to afford opportunity for the commission of the offense, and to lend the

to a person so inclined. Appellant contends, without citation of authority, that it was prejudicial error to give the latter instruction. But an earlier version of the same instruction has been cited with approval (People v. Foster (1974) 36 Cal.App.3d 594, 596). The instruction correctly states a limitation upon the defense of entrapment of which it is proper to inform the jury (People v. Strohl (1976) 57 Cal.App.3d 347, 368; People v. Salas (1975) 51 Cal.App.3d 151, 157). It was

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apparent cooperation of themselves or of a third person for the purpose of detecting the offender. When officers do this, if the suspect himself, originally and independently of the officers, intends to commit the acts constituting a crime, and if he does acts necessary to constitute the crime, he is guilty of the crime committed. He has no defense in the fact that an officer or other person engaged in detecting crime was present and provided the opportunity, or aided or encouraged the commision of the offense.

not error to give the complained-of instruction.

During the cross-examination of Roy Harris, a defense witness, it developed that the witness was wearing in court a concealed weapon for which he had a license. The court had matained a policy of not permitting anyone to come into the courtroom armed, but the bailiff on duty was a substitute who was not aware of the court's rules. The court addressed to the bailiff the following inquiry: "How does that happen? Will you explain to me how somebody comes into my courtroom with a gun?" The bailiff responded, "I can't, your Honor," whereupon the court directed the witness to "step over there and surrender your weapon to the bailiff immediately, please?" At the conclusion of the witness' testimony, the court thanked him for his appearance and stated that he might pick up his weapon on the way out. The witness apologized, stating that he had been unaware of the court's rule against bringing firearms into the courtroom; the court responded, "That's all right. It's just a little phobia I have. I used to be on the third floor. And I was afraid if

somebody on the seventh floor discharged a gun it might come all the way down to the third floor."

Appellant contends that the incident just related must unfairly have damaged the credibility of an important defense witness, and that it was thus prejudicial error. The contention cannot be sustained. The court cast no aspersions on the witness, directing a mild reproof instead to the substitute bailiff who had neglected to see that witnesses did not bring firearms into the courtroom. It was unquestionably within the discretionary power of the trial court to prohibit witnesses from bringing weapons into the courtroom. There is no showing that the court's handling of the situation was improper or that the credibility of the witness was substantially affected.

Appellant contends that the prosecutor several times committed prejudicial misconduct:

1. It is complained that the prosecutor brought out the fact that one of the items seized in the search of appellant's shop was a "handrolled marijuana cigarette." But there was no objection at trial, and appellant

himself concedes that the extraneous information may have been brought out unintentionally. The matter received no further notice so far as the jury was concerned.

2. The prosecutor asked a rather speculative question, which was apparently designed to suggest that appellant might have been cooperating with a certain thief to assist the thief in frustrating forfeiture to law enforcement agencies or to the Internal Revenue Service of stolen property found in the thief's possesssion. A defense objection was sustained, but it is pointed out by the Attorney General that the question was at least arguably proper as bearing on appellant's claim that he had been hoping to purchase from Guzman listed items of property which had been stolen from appellant. The circumstances suggested an inference that the list had in fact been prepared for a fraudulent purpose not related to Guzman's visit. The question was not misconduct.

3. During his closing argument, the prosecutor stated, without support in the record, that

he had "called the district attorney in Contra Costa County" regarding the above-mentioned affair involving a thief. Defense counsel objected, whereupon the court properly admonished the prosecutor "to confine yourself to the evidence before the court and jury." The court's handling of the situation was appropriate. No harm to the defense has been demonstrated, and reversal of the judgment is not called for.

4. A defense witness, attorney Edward R. Fitzsimmons, was impeached when another defense witness, Levitan, testified that Fitzsimmons had given inconsistent evidence in a civil case. In his closing argument, the prosecutor, alluding to the incident of impeachment, stated: "We end up with Mr. Fitzsimmons, a very interesting character. How often do you think you would ever see a lawyer testify here and another lawyer testify that he impeached him before? I don't think you'll ever see that. I don't think I'll ever hear of that again. And yet the defense witness impeached Mr. Fitzsimmons. He had testified falsely before and he knew of it." There was no objection by defense counsel. The passage of argument now belately complained of was

not misconduct.

5. In argument, the prosecutor commented that appellant's financial activities might in some way be connected with people who might "meet to get money to use at the racetrack [in Albany]." There was a defense objection, whereupon the prosecutor withdrew the comment and the court admonished the jury to disregard it. The incident was trivial; there is no reason to suppose that the deliberations of the jury were affected by it.

6. The prosecutor again improperly referred to information outside the trial record in stating in argument, "I got a call from an Albany resident." But a defense objection to this statement was sustained and the jurors were admonished to disregard it. The supposed phone call was concerned with a peripheral matter; again; there is no indication of prejudice.

7. It is complained that the prosecutor should not have closed his argument by reciting some lines of clumsy verse taken from a popular song. There was no objection at trial, and it does not appear how any effects adverse to the defense could have resulted

from the prosecutor's poetic sally.

Finally, appellant complains that the court should have dismissed the indictment upon a showing that a preliminary hearing had previously been abandoned by the prosecutor when the judge of the municipal court had "indicated a disposition to dismiss the complaint." Appellant relies upon a dissenting opinion by Mr. Justice Mosk in People v. Uhlemann (1973) 9 Cal.3d 662, 670, and a concurring opinion by Mr. Justice Mosk in Johnson v. Superior Court (1975) 15 Cal.3d 248, 255. But a concurring or dissenting opinion does not constitute authority (People v. Superior Court (Persons) (1976) 56 Cal.App.3d 191). A prosecutor may proceed by indictment even though a preliminary hearing resulted in an order by the magistrate dismissing the Complaint (People v. Uhlemann, supra, 9 Cal.3d 662). Thus it lay within the authority of the prosecutor in the present case to abandon the proceedings in the municipal court, which might have led to a holding order and to the filing of an information, and proceed instead by indictment.

The judgment is affirmed.

Opinion filed May 19, 1977

EXHIBIT B

Order Due
August 17, 1977

ORDER DENYING HEARING

AFTER JUDGMENT BY THE

COURT OF APPEAL

1st. District, Division, 4
Crim. No. 15735

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

CALL

Sullivan, J., retired, sitting under assignment by the Chairperson of the Judicial Council.

Appellant's petition for hearing DENIED.

/s/ Bird, Chief Just.